NYALCHAND MOTICHAND & CO.
v.
A. S. MOHAMED MYDIN & V. VARUSAY ROWTHER, THIRD PARTY.

[Orig. Civ. Juris. (Taylor, J.) October 4, 1951]

[Penang — Civil Suit No. 168 of 1950]

Common Carrier — Lighterman incurring liability of Common Carrier — Penang tongkang owner not so liable.

A public and general lighterman incurs the same liability as a common carrier in respect of losses during carriage but whether he is a common carrier, and therefore liable for refusal to carry, has never been decided — **Liver Alkali Co., v. Johnson** (1) followed; **Nugent v. Smith** (2) not followed on this point.

A lighterman who trades on the terms of the Penang Lighter Owners' Association is a private, not a public and general, lighterman and is not liable for losses due to perils of the seas (but this may not apply to other lightermen, especially the owners of cargo sampans).

Cases referred to :—

(1) *Liver Alkali Co. v. Johnson* 9 Exch. 338.

(2) *Nugent v. Smith* (1875) 1 C.P.D. at p. 434.

(3) *Quinn v. Leathem* (1901) A.C. at p. 506.

(4) *Lynch v. Edwards* (1921) L.J.K.B. 506.

(5) *Joseph Travers & Co., Ltd. v. Cooper* (1915) 1 K.B. 73.

ACTION.

Ong Huck Lim for the plaintiffs.

F. G. Pooley for the defendant.

R. D. Hume for the 3rd party.

The facts appear sufficiently from the judgment.

Cur. Adv. Vult.

Taylor, J.: — This action raises a question of some general importance regarding the liability of Penang lightermen for losses of cargo between ship and shore.

The facts of the casualty are simple and not in dispute. The plaintiffs, who are merchants, instructed the defendant, who is a lighterman, to carry 500 bags of betel nuts from Weld Quay to a steamer lying in the roads. The defendant, having no suitable vessel available, arranged for another lighterman to execute the order on his behalf. Men employed by the plaintiffs accordingly brought the goods from their warehouse to the quay and when work stopped for the day they had loaded some 340 bags into the lighter. The crew covered the goods with tarpaulins for the night; at that time the tide was low and the lighter was resting on the foreshore which consists of mud and sand; by mid-night the tide was at flood, the lighter was afloat and had taken a little water into the bilge; the crew baled her out and inspected the moorings; the weather was fair.

Three or four hours later they discovered that the vessel was taking in water which they tried in vain to reduce by baling. They then procured another lighter and transhipped about three-quarters of the cargo. They promptly reported the mishap and Lloyd's agent ascertained that 90 bags were damaged by sea water. The vessel was dry-docked and found to have been freshly holed. This must have been due to her settling down, during the lading at ebb, on a sharp and hard piece of wreckage concealed in the mud.

The history of the litigation is somewhat involved. The plaintiffs had insured the whole consignment, of which the 340 bags were a part, with the New India Insurance Company who paid the plaintiffs' claim, subject to certain deductions, and took a letter of subrogation, under which they now seek to recover the amount paid; thus the insurers are the real plaintiffs. Nominally the merchants are suing the defendant, with whom alone they contracted, and the defendant has brought in the owner of the lighter as a third party from whom he claims indemnity in the event of him being held liable to the plaintiffs.

The cause of action stated in the writ was breach of duty. The plea in the statement of claim was negligence. In response to a request for particulars of the alleged negligence the plaintiffs said that it was a case of *res ipsa loquitur*. At the commencement of the trial they applied to amend their statement of claim by adding an alternative plea that the defendant was liable as a common carrier. This amendment was allowed on terms and the defendant then amended his defence, pleading that by the custom of the port of Penang lightermen are liable, not as common carriers but only for losses due to their own default.

On the issue of negligence it was clear that the accident would not have occurred had the vessel been kept always afloat but obviously that would involve using some sort of pontoon between quay and lighter. In the absence of evidence that any such arrangement is usual, it is impossible to say that mere failure to keep afloat is negligent, so on this issue the plaintiffs failed. In any event the evidence given later shewed that it is neither usual nor practicable to avoid grounding at ebb at Weld Quay and there is no other accommodation for lighters of this type. Similar accidents have occurred in the past and the Harbour Board have dredged the area but fragments of wreckage are shifted by tides and currents and the individual lighterman has no means of avoiding the snags; these

are more numerous since the war by reason of aerial bombing of the water-front but no one snag can be attributed to the King's Enemies. The case is similar in point of law to that of *Liver Alkali Co. v. Johnson*[1] who went aground in a fog, the adverse weather not amounting to an Act of God. In short, the casualty was due to a peril of the seas. The question therefore is whether the defendant is liable as a common carrier. As he is a member of the Penang Lighter Owners' Association, all the members of which do business on similar terms, the decision may affect a large section of the water-front industry.

The first line of argument was that a public or general lighterman is a common carrier, as a matter of law. The characteristics of a common carrier are that he holds himself out, expressly or by his course of conduct, as willing to carry for any person who offers to pay a fair rate, provided that he has room in his vehicle. It has been suggested that he must also have a fixed route or fixed termini. It is not necessary to express any opinion as to this because all the Penang lightermen operate between Weld Quay and ships lying in the roads; the ships are, of course, at some distance from one another but they are all in one anchorage which is a sufficiently definite place to satisfy this requirement. A common carrier need not necessarily convey as such; he can limit his liability either by special contract or by notice to his customers generally and it may also be limited by usage or by local custom. A common carrier by land is liable to an action if, having room, he refuses to carry on the usual terms.

As regards lighterman, the leading case is *Liver Alkali Co. v. Johnson*[1], in which the Exchequer Chamber held that a general lighterman incurs the same liability as a common carrier for failure to carry safely but they expressly left open the question whether he is liable for refusing to carry. In *Nugent v. Smith*[2], Cockburn, L.C.J., said that the decision in the *Liver case*[1] proceeded on the ground that Johnson was a common carrier. This appears to have troubled some of the text writers who debate the question whether there is, or can be, a third class of carriers, neither common nor private. In *Nugent's* case the ship was admittedly a general ship; the main object of Lord Cockburn's judgment was to negative the theory that the Common Law of carriage was derived from the Roman Law. The whole passage is *obiter,* as the Lord Chief Justice expressly states at page 427. Mellish, L.J. at page 439 began by emphasising that Smith was a common carrier so that the question whether a person who was not a common carrier could be liable as such did not arise. To me, it is clear that in the *Liver case*[1] Lord Blackburn was very conscious of the fact that he was presiding over a Court of Appeal so that if he had said, in terms, that a public or general lighterman was a common carrier, subsequent Courts, especially of first instance, would have felt bound to hold that a lighterman was liable for refusing to carry. He was careful to leave that point open because it did not require decision in the case before him and it had not been argued. With profound respect to Lord Cockburn I would say that in my opinion the *Liver*[1] judgment does not require the construction which he suggested. "A case is an authority only for what it actually decides. I entirely deny that it can be quoted for a proposition which may seem to follow from it," *Quinn v. Leathem*[3]. It is settled that a common carrier by land is liable for refusal and also for failure to carry safely. Whether a general lighterman is liable for refusal has never been decided and therefore he cannot properly be said to be a common carrier but as regards failure to carry safely his liabilities are the same as if he were one. The questions for decision in this case therefore are whether the defendant is a public and general lighterman and, if so, whether his liability was limited by his contract or by usage. These questions cannot be answered without going into the history of the matter and the conditions in which the business is done.

From the founding of the port of Penang the lighterage business has been largely in the hands of a few families of Tamil-speaking southern Indian Moslems who are probably in part descended from the early Arab traders. These people have gradually built up a monopoly of a section of the trade and it is a point of interest that in so doing they have adopted some of the words of their former competitors of other races. "*Tongkang*" is a Chinese word meaning a large barge-like vessel, with sails. "*Taikong*" is a Chinese word for the master of a vessel. Sampan is a word of Chinese origin, now "naturalised" in Malay, meaning a boat with oars but nowadays many sampans are powered, especially with outboard motors, and the tendency is to build them larger, some of those in Penang exceeding fifty tons; cargo sampans are lighters within the meaning of the authorities. At the present time the distinction between a tongkang and a sampan depends on the shape and style of the craft, rather than on the nature of her use; a tongkang is a lighter but a lighter is not necessarily a tongkang. The defendant and the third party in this action are tongkang owners and the Association to which they belong, the *Penang Lighter Owners' Association,* controls all the tongkangs in Penang. It would be

more accurate if they called it the *Tongkang Owners' Association,* as some of them do, in ordinary parlance.

Their method of business is peculiar. Each member has a list of his regular customers and all members are strictly bound by the rules not to accept an order from anyone who is on another member's list.

Some of the witnesses spoke of "contracts" with their customers but this is a loose use of the term. They do not make standing or period contracts with merchants on the basis — "I will carry all your goods in consideration of your undertaking to give all your lightering to me." The merchant does not promise not to employ anyone else; he knows that if he does not have a regular lighterman he will have to go round the town looking for a lighter every time he wants one, which is wholly unpractical for a man who has any regular import or export trade. When he starts his business he can choose his lighterman but once he has done so he has no further option; he must give all his orders to that lighterman because no other will carry for him. It is understood that his goods will not be delayed; if the lighterman has no vessel available on a day when the merchant requiries one, it is the lighterman's duty to go round until he finds one; he then passes on the order but he remains responsible to the merchants; he receives the hire and settles with the substitute. The exclusive feature of the arrangement is not a term of any contract between merchant and lighterman; it is a mutual arrangement among the tongkang owners, to regulate their section of the trade, to limit the competition between themselves and to maintain their monopoly. Theoretically such an arrangement might be liable to abuse but in practice there is little danger because the merchants have an organised Chamber of Commerce and if lighterage rates were unfairly raised against them they could, and, I think soon would, set up a company to operate their own fleet of powered lighters which, once established, would virtually kill the business of the members of the Association.

The rule: "one merchant — one lighterman" is subject to minor variations; the East Asiatic Company, for instance, who handle a very large volume of rice, employ one firm of tongkang owners for rice and another firm for miscellaneous cargo but these variations do not affect the matter here considered; the broad effect of the scheme is that all the principal merchants are distributed among the lightermen, so that the main bulk of the traffic is canalised.

As regards casual orders, counsel for the plaintiffs put the point directly to one of the trade witnesses :— "Would you load five tons of rubber for me?" The question is not academic; it is not unusual for a man who is not a regular shipper to buy a commodity as a private venture but he very seldom handles the physical goods; usually he goes to a broker and arranges to finance the shipment; the broker passes the business to one of the merchant houses, most of which are agents both for plantation companies and for shipping lines; the merchant appropriates goods to the particular order by reference to the shipping marks and numbers of the packages and consigns them, with others, to Europe or America; if lightering is required it will be done by the regular lighterman of the merchant house. Similarly with imports; many private people returning from furlough bring their own motor cars but they consign them to one of the garage companies who take delivery and prepare them for the road. When a large ship arrives from England with a dozen cars, four or five are already privately owned and the remainder are for the trade but they must come over the side as stowed and at that stage they cannot be distinguished; the whole string are taken off by the garage company's lighterman. These facts were not fully brought out in the oral evidence, most of which was given in Tamil, but counsel for all parties agreed that the general practice is as stated. Miscellaneous parcels not cleared by consignees are brought off by the regular lighterman of the ship's agent. All this refers only to tongkangs; a good deal of traffic, especially for the entrepot trade, is carried by cargo sampans which are outside the control of the Association.

These two factors, agency and cargo sampans, account for the infrequency of casual orders for tongkangs. The defendant said that he refused such orders; this was biassed evidence and I do not accept it but Daud Ghani Rowther, an independent witness who made a good impression from the witness-box, said that although he was perfectly willing to accept a casual order he could not remember even one offer in a twelve month. The lists, however, are not closed; the tongkang owners are ready and willing to accept new customers and in fact do so.

It is clear that the only contract between the plaintiffs and the defendant was an oral contract for the carriage of the particular parcel — each order being a distinct contract — and that nothing was said about liabilities.

The defendant called a number of witnesses with reference to his plea that by custom a Penang lighterman is liable only for losses due to his own default. There is no question of immemorial custom; the term

was used loosely to mean, or include, usage. Much of this evidence amounted to no more than shewing a rule of thumb for the guidance of merchants' office staffs; in case of shortage they claim against the lighterman, because they know that that risk is not covered by the ordinary insurance policy; in all other cases (except possibly damage by rain) they claim under the policy, if the goods are insured. None of them could remember a claim similar to the present one. The best informed of the witnesses on this issue was Khoo Guan Hoe, a senior clerk in one of the large merchant houses who are agents for plantations and shipping lines and also for insurance companies; he has long experience of lightering business from the points of view of both shippers and insurers and he says that cases of alleged negligence are difficult and must be investigated; he said nothing about any stipulation regarding liability and his evidence, as a whole, tended to negative the alleged usage; indeed all the evidence was of a negative character. On this issue the onus of proof was on the defendant and he wholly failed to discharge it. The liability of lightermen can be limited in the manner suggested, *Lynch v. Edwards*[4], but in that case there was a definite clause; the report does not show by whom it was made or published but its existence was proved. Here the lightermen are trying to set up a usage without any clause on which to found it.

The case finally rests therefore on the question whether a lighterman with a long list of regular customers, willing to take more and willing to take a casual order if offered, is a public or general lighterman. No case bearing on this point was cited and the only one which I have been able to find is *Joseph Travers & Co. Ltd. v. Cooper*[5]. In that case the defendant was primarily a warehouseman and he lightered only for his own customers. Buckley, L.J. finds as a fact, at page 83, that he did hold himself out as ready to carry for anyone who resorted to him in his capacity as a wharfinger. The judgment of Phillimore, L.J. at page 98 is to the same effect; Kennedy, L.J. at page 92, inclined to the same view. The actual decision in that case was on a different issue but all three members of the Court cited the *Liver case, supra,* in which the defendant "carried for anyone who chose to employ him." Similarly Cooper warehoused goods for the public at large and lightered for such of his customers as desired him to do so. That conforms to the *Liver*[1] decision but is distinguishable from the present case where the defendant serves only listed customers. Cooper had no such list for his warehouse.

Whether a man is a common carrier, or a general lighterman, is a question of fact. It seems to me that a man whose business is restricted to a list of regular customers and who scarcely ever has the opportunity to carry for a member of the general public is not a common or general carrier and that it would be artificial to make him liable as such, merely because he is willing to carry for a stranger on rare and isolated occasions. I do not think that the issue is affected by the fact that he can, and does, make additions to his list of regular customers; obviously he would not add a new customer without some enquiry as to the probable volume of traffic, to enable him to judge whether his fleet of lighters would ordinarily suffice. If he had to pass on three-quarters of the new work to other firms there would be more trouble than profit and also the committee of the Association would probably interfere. This element of selectivity prevents additions to the list from affecting his character as a private rather than a public lighterman.

For these reasons I am of opinion that the defendant is not a public and general lighterman and therefore that he did not incur the liability of a common carrier.

It must be emphasised that this decision is based on the peculiar practice of the Penang Lighter Owners' Association; it relates to the community, not to the port. There are other lightermen, especially the owners of cargo sampans, who may not be organised in a similar manner and who may incur a liability similar to that of Johnson in the case cited.

The plaintiffs failed on all points but one and the suit was dismissed.

As regards costs it was ruled at an early stage that the plaintiffs must, in any event, pay the costs of trying the issue of negligence which were thrown away. At the close of the argument it was pointed out that the statement of claim merely set out the amount paid by the insurance company under their policy. The plaintiffs' solicitors are responsible for this; they say to the defendant, in effect, "That is what our insurers paid to us and you must recoup them" — regardless of the obvious fact that the defendant could not possibly be liable to the same extent, which included an insured margin of profit. The defendant is liable, if at all, for the actual loss; the measure is the market value of the goods, as they lay in the lighter before the casualty, less salvage. Counsel for the plaintiffs assented to this and said that all the particulars were in the agreed correspondence but even that is not wholly correct. The charges for loading are not

separated and there cannot be a claim for freight for a voyage which never began. It is not enough to hand in a bundle of papers, containing part of the required information and invite the Court to extract particulars of what is to be awarded. Had the plaintiffs succeeded I would have deprived them of the costs of the statement of claim on the ground that their particulars were framed on a wholly wrong basis.

The market value of the nuts, as assessed by Lloyd's agent, was $18 per picul and the salvage value, when wet, was $5. The loss was therefore of 90 bags, averaging 1.70 piculs, at $13 or $1,989. I allow 50 cents a bag for loading, which is on the low side, and assess the damages, *ex cautela*, at $2,034, or £237.

As the defendant had to plead to the amendment at short notice he ought to have his costs of the amended defence but there was a long adjournment (owing to my absence from Penang on other duty) during which he could, and presumably did, investigate his evidence of usage which occupied at least one full day and as he wholly failed to establish it, the onus being on him, I disallowed the costs of that day. Subject to this adjustment the plaintiffs must pay the costs of the defendant and of the third party.

Order accordingly.

GOH SOON LEONG
v.
THE COMMISSIONER OF LANDS AND TWO ORS.

[Court of Appeal (Taylor, Spenser Wilkinson and Wilson, JJ.) October 22, 1951]

[F. M. — Civil Appeal No. 7 of 1951]

Malay Reservations Enactment, No. 63 (Kedah), ss. 4, 6 and 7 —Whether transfer of land by Malay to non-Malay void ab initio.

A transfer to a non-Malay is not absolutely prohibited or necessarily void ab initio; the transferor risks forfeiture but he does not incur an automatic forfeiture; he is assured of a hearing and if he can satisfy the State Council, they will not enforce the forfeiture and in such a case they will, presumably, excise the land from the Reservation.

APPEAL from an order of the High Court, Alor Star.

Ong Huck Lim for the appellant.

The Commissioner of Lands appeared in person.

F. G. Pooley for the second respondent.

The facts appear sufficiently from the judgment of Taylor, J.

Cur. Adv. Vult.

Taylor, J. : — This was an appeal to the Court of Appeal from an order of the High Court at Alor Star dismissing an appeal to that Court from an order of the Director of Lands (as Delegate of the Commissioner of Lands) allowing an appeal to the Commissioner against an order of the Collector of Land Revenue under the Titles to Land (Occupation Period) Ordinance, expunging the memorials of an occupation transfer.

The circumstances were a little unusual and raised some technical points which were dealt with in the oral judgments delivered in the Court of Appeal; these points are of little general interest and the Court did not at the time consider written judgments to be necessary but some of the parties, including the Commissioner of Lands, have asked for a written statement of the construction which the Court put upon the Malay Reservations Enactment, which they say may assist them in other cases.

For this purpose the facts may be summarised. During the enemy occupation a Malay holder of Malay Reservation Land in Kedah sold and purported to transfer it to a non-Malay, with the permission of the Japanese authority, and the land was later transferred to another non-Malay; after the war, the Collector expunged the memorials of the transfers, thus restoring the Malay vendor to the register. A third non-Malay, who held a decree against the vendor, then sought to attach the land; this decree-holder was a stranger to all the dealings with the land. The last purchaser appealed to the Commissioner of Lands to restore the memorials of transfer; he also applied to the State Council to excise the land from the Malay Reservation; the Council deferred their decision, probably for the reason, *inter alia*, that litigation was pending; it was shewn that in view of unusual conditions during and since the war excisions had been made in comparable cases.

The Commissioner's Delegate held an enquiry with the proper parties before him; he ascertained the facts and delivered a well-reasoned judgment, stating the principles which he considered applicable; these were mainly equitable principles. His conclusion was that the purchaser had the higher equity and he accordingly ordered restoration of the transfers.

The principal question in the appeal turns on the construction of the Malay Reservations Enactment, No. 63. Section 6 does not, in terms, forbid the making of a transfer by a Malay to a non-Malay; it enacts only that such a transfer shall not operate to vest the